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No. 02-1062

FILED
FEB 11 2003

IN THE
SUPREME COURT OF THE UNITED STATES

CITY OF WHITE PLAINS,

Petitioner,

v.

TCG NEW YORK, INC., TC SYSTEMS, INC., AND TELEPORT COMMUNICATIONS d/b/a TCNY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE CITY OF NEW YORK IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Amicus Curiae City
of New York,
100 Church Street,
New York, New York 10007.
(212) 788-1056 or 788-1327

LEONARD J. KOERNER*
STEPHEN J. MCGRATH
BRUCE REGAL,
of Counsel.

*Counsel of Record

FEBRUARY 11, 2003

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v.

TCG NEW YORK, INC., TC SYSTEMS, INC., AND TELEPORT COMMUNICATIONS d/b/a TCNY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE CITY OF NEW YORK IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The City of New York ("the City") submits this brief in support of the petition for a writ of certiorari in this matter.

INTEREST OF THE AMICUS CURIAE

The City has a significant interest in having this Court grant the petition. The City's Charter, as constituted since 1898, requires that any private entity that seeks to occupy streets owned by the City for the provision of services such as telecommunications must receive a

"franchise" -- a type of lease -- from the City, and must pay adequate compensation to the City for its occupancy of such streets (New York City Charter § 365). In its fiscal year 2002, New York City received approximately $25 million from companies comparable to respondent complying with the franchise compensation requirement of the City Charter. Since 1990, the City has granted franchises, consistent with the City Charter, to twenty different companies to provide services similar to those offered by respondents, which franchises include many terms, such as compensation terms, similar to those at issue in the case at bar. However, because the incumbent local exchange company in the City, Verizon Communications, Inc. ("Verizon"), claims rights to occupy the City's streets that predate 1898, when the City Charter's adequate compensation requirement became effective, the Second Circuit's decision threatens the City's ability to enforce the adequate compensation provision of the City Charter with respect to future franchise applicants comparable to respondents. In addition, the City's form of franchise contract includes a number of provisions intended to protect the interests of the City's citizens that, pursuant to the Second Circuit's decision, the City may be preempted from including in future franchise agreements covering services comparable to those sought to be offered by respondent TCG New York, Inc. ("TCG").

SUMMARY OF THE ARGUMENT

The petition should be granted for four reasons:

First, the issues raised in this case are of great significance. For municipalities around the country, who paid for and own thousands of miles of streets and other similar property, worth billions of dollars, the ownership and control of such property are brought into serious

question by the Second Circuit's decision; additionally, the split in the circuits on the issues raised in this case is causing uncertainty and confusion in the implementation of the 1996 Telecommunications Act (codified at 47 U.S.C. §§ 151 et seq.).

Second, the Second Circuit's decision splits fundamentally from the Eleventh Circuit's common sense, plain meaning understanding of 47 U.S.C. § 253(a) (hereinafter, "§ 253(a)") in the BellSouth case cited below (at page 8), and infringes on local government authority over local streets to an extent far beyond what Congress provided. By assuming that any *condition* that a local government places on the use of its streets is automatically and by its nature a *prohibition* on the provision of telecommunications services, no matter how amenable to compliance such a condition may be in practice, the Second Circuit's decision destroys the careful balance established by Congress between the property rights and authority of local communities on the one hand and the interests of telecommunications providers on the other. Indeed, the Second Circuit's conflation of conditions with prohibitions renders nonsensical the structure of § 253(a).

Third, the Second Circuit's decision splits fundamentally from the Sixth Circuit's common sense, plain meaning understanding of 47 U.S.C. § 253(c) (hereinafter, "§ 253(c)") in the TCG Detroit case cited below (at pages 8-9) in a manner that may in effect replace the provision that Congress adopted with a court-created provision comparable to one that Congress definitively rejected.

Fourth, the Second Circuit decision facially invalidates certain pieces of local legislative and regulatory language that are fully capable of being applied or enforced

in a manner wholly consistent with even the Second Circuit's own (excessively narrow) view of local authority. Thus, the Second Circuit decision runs afoul of long-standing judicial principles regarding facial invalidation of legislative and regulatory language.

In short, the Second Circuit's inconsistency with the Eleventh and Sixth Circuits, and with settled principles of separation of powers, could cost local communities and their taxpayers millions of dollars and damage the ability of local entities to manage and control the property they purchased, own and operate. Unless this Court grants the petition for a writ of certiorari in this case, the split in the circuits regarding the application of 47 U.S.C. § 253 will result in ongoing confusion as to the appropriate balance in the relationship between local government authority over its own property and the rights of telecommunications service providers.

ARGUMENT

I. THE ISSUES RAISED ARE OF GREAT SIGNIFICANCE.

In its fiscal year 2002, the City of New York collected over $25 million in rent from telecommunications providers whose facilities are installed in property owned by the City. Thousands of other municipalities across the country similarly collect and rely on rentals generated from the occupancy by telecommunications providers of property purchased and maintained by municipalities with taxpayer funds. An inability to collect such rents will negatively affect local taxpayers and citizens, either by necessitating tax increases or requiring reductions in local services. The Second Circuit's decision in this case calls into question municipal authority to collect reasonable rent for the use of municipally purchased and owned property, and to manage such property in the public interest.

In addition, the confusion that the Second Circuit's decision is causing, inconsistent as it is with decisions of the Sixth and Eleventh Circuits, threatens to interfere with the growth and health of the telecommunications services marketplace. Since the Second Circuit's decision was issued, the City has received numerous calls and letters from telecommunications providers uncertain about how to proceed with respect to use of municipally owned property. In light of conflicting court of appeals decisions and inconsistencies between the language of the applicable statutory provisions and the implications of the Second Circuit decision, such uncertainty is inevitable until this Court acts definitively. Unless and until this Court resolves the split in the circuits regarding their differing interpretations of 47 U.S.C. § 253, neither municipalities

nor telecommunications service providers will be able to proceed with certainty in making investments and reaching agreements that will enable the expansion and growth of the telecommunications market in a manner consistent with the property rights and interests of local governments representing local taxpayers and citizens.

II. THE DECISION BELOW SPLITS RADICALLY FROM THE PLAIN MEANING UNDERSTANDING OF §253(a) RECOGNIZED BY THE ELEVENTH CIRCUIT, AND RUNS AFOUL OF THE CLEAR LANGUAGE OF §253(a).

§ 253(a) provides as follows:

> In general - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

In the case below, the City of White Plains ("White Plains") was never shown to have "prohibited" or "effectively prohibited" TCG from providing any telecommunications service. White Plains did require that if TCG were to install facilities in street property owned by White Plains, TCG would be required to meet certain conditions (including the payment of rent) comparable to those any landowner might require of an entity seeking, as was TCG, to become a tenant on the landowner's property. See St. Louis v. Western Union Telegraph Co. 148 U.S. 92 (1893), petition for rehearing denied 149 U.S. 465 (1893). There was no showing below that TCG would be unable to

meet these conditions or that it could not viably provide service while meeting these conditions. Indeed, the only relevant fact adduced below relevant to TCG's ability to meet the proposed conditions was that other companies similarly situated to TCG had agreed to such conditions and have provided service in accordance with such conditions. That other telecommunications companies had agreed to meet such conditions, and have provided service pursuant to such conditions, seems to suggest that TCG could do the same, or at least that TCG should have the burden of proof of showing why it, unlike others, would be unable to provide service while meeting the conditions for tenancy proposed by White Plains. Yet without any such showing, the Second Circuit determined, as a matter of law, that the conditions of tenancy proposed by White Plains represented a "prohibition" or "effective prohibition" on TCG's provision of service and therefore a violation of § 253(a).

While the Second Circuit's discussion of this issue is extremely cursory, it appears that the court assumed that the mere existence of conditions to a tenancy, no matter how easily met, are tantamount to a "prohibition" and thus a violation of § 253(a). But to view any *condition* that a local government places on the use of its property as being equal, as a matter of law, to a *prohibition* on the provision of telecommunications service makes nonsensical the structure of § 253. If any *condition* (such as, for example, a rent payment requirement) is automatically and necessarily a *prohibition*, then why did Congress provide in § 253(a) that local governments may not "prohibit *or have the effective of prohibiting*" provision of telecommunications service? If Congress meant for every condition to automatically constitute a prohibition, then there would be no need for a separate ban on "effective" prohibition; that is, the reference to effective prohibition would constitute

meaningless surplusage. Furthermore, if Congress had meant to say in § 253(a) that local governments may not place any conditions or requirements on the use of local rights of way for telecommunications purposes, it could have done so straightforwardly, as it did elsewhere in Title 47, for example in 47 U.S.C. § 544(a) ("Any franchising authority may not regulate the services, facilities and equipment provided by a cable operator except to the extent consistent with this title."). But Congress chose not to limit local government conditions or requirements in § 253(a), unless such conditions or requirements become so onerous and difficult to meet as to "effectively" prevent the provision of service.

There was no showing of such onerousness in the case below. All we know about TCG with respect to the conditions of tenancy required by White Plains is that TCG *preferred* not to meet such conditions, and therefore it *refused* to meet such conditions -- no showing was made that TCG was unable to meet such conditions or that such conditions were so onerous that TCG would have been effectively prevented from providing service. The Second Circuit should have remanded this case to the District Court for a factual determination as to whether the conditions that White Plains sought to require from TCG as the terms of TCG's tenancy on White Plains property were so onerous or difficult to meet as to rise to the level of an effective prohibition on TCG's ability to provide service. Only such a factual determination can determine whether White Plains violated § 253(a). When presented with the same kind of issue, the Eleventh Circuit issued just such a remand. See BellSouth Telecommunications, Inc. v. Town of Palm Beach 252 F.3d 1169 (11th Cir. 2001) ("BellSouth"). The Sixth Circuit has also considered this question in a similar case:

> TCG attempts to characterize the City's ordinance as a prohibition, itself prohibited by 47 U.S.C. § 253(a).... This is sophistry. The provider must apply for a franchise; the City assesses a franchise fee; no fee paid, no franchise given. That cannot "be described as a prohibition [within the meaning of section 253(a)]".

TCG Detroit v. City of Dearborn 206 F.3d 618 at 624 (6th Cir. 2000) ("TCG Detroit"). This Court should grant certiorari in this case to resolve the split in the circuits regarding the treatment of § 253(a) and reestablish the proper approach to § 253(a), previously recognized by the Eleventh and Sixth Circuits, by remanding the case to the trial court for a determination as to the actual prohibitory effect of the lease conditions proposed by White Plains.

III. THE DECISION BELOW SPLITS RADICALLY FROM THE SIXTH CIRCUIT'S PLAIN MEANING UNDERSTANDING OF §253(c), EFFECTIVELY IGNORING THE LANGUAGE ADOPTED BY CONGRESS AND REPLACING IT WITH A POLICY SPECIFICALLY REJECTED BY CONGRESS.

Even if, *arguendo*, the Second Circuit had been correct in its assumption that White Plains' proposed lease terms constituted a "prohibition" under § 253(a), such terms would still not be preempted if they are protected by the safe harbor of § 253(c), which provides as follows:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

The Second Circuit concluded that the monetary rent proposed by White Plains (structured similarly to the rental charged by White Plains from cable television companies and specifically endorsed for that purpose by Congress in 47 U.S.C. § 542) was not "competitively neutral and nondiscriminatory" because one other telecommunications company, Verizon, is not currently paying White Plains, on a going forward basis, the same monetary rental. But Verizon claims to have acquired its authority to use the streets of White Plains over a century ago, and there is nothing in the record below to indicate that White Plains has the authority to charge Verizon today, on a going forward basis, for an asset that was obtained in the nineteenth century.

If a seller sold a piece of property to Buyer A one hundred years ago, a 1996 requirement that the seller act in a "competitively neutral and nondiscriminatory" manner today does not require the seller to now give away all its property for free to potential Buyers B, C, D, E and F merely because Buyer A no longer has a "going forward" rental obligation with respect to the property it bought a century ago. The Sixth Circuit in TCG Detroit recognized this obvious point, but the Second Circuit explicitly rejected the Sixth Circuit's approach ("we think TCG

Detroit was wrongly decided" TCG New York, Inc. v. City of White Plains 305 F. 3d 67 at 80 (2d Cir. 2002)).

But even if, *arguendo*, such a nonsensical result -- competitive neutrality requiring property to be given away for free in the twenty-first century because others acquired comparable property in the nineteenth century -- were required in theory, in practice in this case it would be entirely unnecessary, because Verizon and TCG operate in profoundly different manners and a "competitively neutral and nondiscriminatory" requirement does not require them to be charged on the same basis. As the District Court in this case recognized, "Bell Atlantic [now known as Verizon] must offer universal service and affordable rates to the City's residents, while new entrants such as TCG may limit their offerings to the most profitable business centers." TCG New York, Inc. v. City of White Plains 125 F. Supp. 2d 81 at 98-99 (S.D.N.Y. 2000). That is, as the District Court below acknowledged, Verizon offers telecommunications facilities and services to every resident and business in White Plains who seeks it, an expensive but profoundly important contribution to the White Plains community, while TCG is a "cherry-picker", building facilities only where it chooses, and generally choosing only locations with the highest concentrations of users of the most profitable, commercial telecommunications service. The plain meaning of the phrase "competitively neutral and nondiscriminatory" makes clear that two companies engaged in such profoundly different kinds of businesses and making such profoundly different levels of public contribution need not, *contra* the Second Circuit, be charged in exactly the same way "going forward".

Indeed, Congress itself recognized these arguments in creating 47 U.S.C. § 253 as enacted. As the District Court below in this case pointed out (125 F. Supp. 2d 81 at

98), the House Commerce Committee sent a version of § 253(c) to the floor of Congress that would have required parity in compensation for local rights-of-way between incumbent local exchange companies such as Verizon and providers such as TCG. But this provision was overwhelmingly rejected on the floor of the House, replaced by the current § 253(c). By interpreting § 253(c) in its current form to be the equivalent of a provision specifically rejected by Congress, the Second Circuit has both split from the Sixth Circuit and failed to abide by the Congressional mandate to respect the property rights of local communities and local authority to make reasonable distinctions between different types of providers in developing compensation requirements.

In sum, this Court should grant certiorari in this case to either (1) remand to the trial court for a determination as to whether White Plains even has the authority to require Verizon to pay the type of monetary compensation in question on a "going forward" basis (without which authority White Plains lacks the capacity to "discriminate" in favor of Verizon), or (2) restore the District Court's conclusion that Verizon and TCG are so different in the nature of their respective businesses and contributions to the community that a difference in going forward compensation received by White Plains from these two companies would not be inconsistent with § 253(c)'s safe harbor.

IV. THE DECISION BELOW FACIALLY INVALIDATES LEGISLATIVE AND REGULATORY LANGUAGE THAT IS CAPABLE OF LAWFUL APPLICATION, AND IS THUS INCONSISTENT WITH §253(a) AND ESTABLISHED PRINCIPLES OF JUDICIAL RESTRAINT.

Even if, *arguendo*, the Second Circuit was correct in its (unsupported) conclusion that lease conditions White Plains sought to require of TCG were "prohibitions" banned by § 253(a), the Second Circuit vastly overreached its authority by preempting a variety of provisions that merely authorized but did not compel administrative or regulatory action, and were entirely amenable of being applied in a lawful way (even by the Second Circuit's inappropriately cramped definition of lawfulness).

For example, the Second Circuit preempts White Plains legislative language that merely authorizes the applicable White Plains administrative body to "reject any application [to use local street property] based on any 'public interest factors... that are deemed pertinent by the City'". The Second Circuit says such legislation "amounts to *a right to prohibit* providing telecommunications services, albeit one that can be waived by the City" [emphasis added] TCG New York, Inc. v. City of White Plains 305 F. 3d 67 at 76 (2d Cir. 2002). But § 253(a) bans prohibition or effective prohibition, not a mere "right to prohibit" that may or may not be exercised in actual application. The provision the Second Circuit cites here is merely a general legislative authorization of an administrative body's power to act. Such legislative empowerment does not prohibit or effectively prohibit any

entity from providing any telecommunications service. Nothing in § 253(a) bans the legislative empowerment of an executive or administrative body. Only the very act of prohibiting or effectively prohibiting the provision of service is banned by § 253(a). So long as the legislative language is capable of being implemented in a way that comports with § 253(a), such legislative language is not preempted. The mere fact that such language is also theoretically capable of being implemented in a manner inconsistent with § 253(a) is not enough to justify preemption.

It is a principle well established by this Court that a mere potential conflict with federal law is not a sufficient basis for preemption of a state or local action. As Justice Rehnquist stated in his opinion for this Court, reversing a preemption decision below in Rice v. Norman Williams Co., 458 U.S. 654 (1982), at 659: "The existence of a hypothetical or potential conflict is insufficient to warrant pre-emption of the state statute."

Indeed, were all state or local legislative language preempted that is merely potentially implemented in a manner inconsistent with § 253(a), throughout the nation many state or local charters, laws and rules, that do nothing more offensive than create or authorize executive or administrative bodies to enter into leases of public property, may be banned, as such charters, laws and rules are, by their nature as authorizing language, likely to be broad and general. The role of state and local legislatures and rulemaking bodies, especially on matters related to property transactions such as those at issue in this case, is to set broad guidelines while leaving the details of individual transactional decisions to the authorized executive agency or administrative body. If the empowered executive or administrator implements its

authority in a manner that does not prohibit or effectively prohibit the provision of telecommunications service, then there is no preemption. As Justice Rehnquist further expressed the matter in the Rice decision, 458 U.S. at 664:

> One might be able to hypothesize an arrangement enforced by the [state's] designation statute that might be prohibited by [the relevant federal statute], but this is insufficient to invalidate a state statute.... "To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co.* v. *Detroit* 362 U.S. 440, 446 (1960).

The Court should, in short, grant certiorari to restore the proper balance among the legislative, judicial and executive branches and between the federal courts and state and local authorities, by making clear that state and local laws, rules and provisions capable of being enforced in a manner compliant with § 253(a) are not prohibited by § 253(a), and that preemption is only effective when a provision is either incapable of lawful implementation or is actually implemented in an unlawful manner.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Amicus Curiae
City of New York.

LEONARD J. KOERNER,*
STEPHEN J. MCGRATH,
BRUCE REGAL,
of Counsel.

*Counsel of Record

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